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Nos. 84-21
84-38

In the

Supreme Court of the United States

OCTOBER TERM 1984

PEOPLE OF THE STATE OF ILLINOIS and
PEOPLE OF THE STATE OF MICHIGAN,
Petitioners,

v.

CITY OF MILWAUKEE, et al.,
Respondents.

PEOPLE OF THE STATE OF ILLINOIS and the
METROPOLITAN SANITARY DISTRICT OF
GREATER CHICAGO,
Petitioners,

v.

THE SANITARY DISTRICT OF HAMMOND, et al.,
Respondents.

WILLIAM J. SCOTT,
Petitioner,

v.

CITY OF HAMMOND, INDIANA, et al.,
Respondents.

HAMMOND RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply the limitations on state power recognized by this Court in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972) (*"Milwaukee I"*), in its decision that Illinois law and courts could not govern discharges to Lake Michigan by a municipality located in Indiana?

2. Did the Court of Appeals correctly determine that interstate water pollution disputes involve the same considerations of federalism as disputes over the allocation of water in interstate rivers and lakes?

3. Did the Court of Appeals correctly determine that the limitations on state power recognized in *Milwaukee I* remain unaffected by the passage of the 1972 amendments to the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1251 *et seq.,* and this Court's decision in *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981) (*"Milwaukee II"*)?

4. Did the Court of Appeals' decision that Illinois could not govern discharges made in Indiana constitute the application of principles of federalism derived from the Constitution rather than, as petitioners claim, the creation of a separate body of federal choice-of-law rules?

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 2

THE NATURE OF THE CASES 2

REASONS FOR DENYING THE WRITS 6

I

INTRODUCTION 6

II

UNDER OUR FEDERAL SYSTEM STATES AND THEIR COURTS CANNOT HAVE EXTRATERRITORIAL POWER OVER THE USE OF INTERSTATE WATERS 9

III

THE FWPCA DOES NOT AUTHORIZE THE USE OF STATE LAW TO GOVERN OUT-OF-STATE DISCHARGES 13

IV

ERIE IS NOT APPLICABLE 15

CONCLUSION 16

LIST OF AUTHORITIES

Cases

PAGE

Allstate Insurance Co. v. *Hague,* 449 U.S. 302, 324 (1981) 11

Angel v. *Bullington,* 330 U.S. 183, 186-187, 192 (1947) .. 11

Bradford Electric Co. v. *Clapper,* 286 U.S. 145 (1932) 11

City of Milwaukee v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304 (1981) ..... *passim*

Erie R. Co. v. *Tompkins,* 304 U.S. 64 (1938) 7, 15

Georgia v. *Tennessee Copper Co.,* 206 U.S. 230, 237 (1907) 9, 10

Hanson v. *Denckla,* 357 U.S. 235, 251 (1958) 12

Hinderlider v. *LaPlata & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938) 7, 9, 15

Illinois v. *City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91 (1972) ..... *passim*

Illinois v. *Sanitary District of Hammond,* 498 F. Supp. 166 (N.D. Ill. 1980) 13

Kansas v. *Colorado,* 206 U.S. 46, 95 (1907) 10

Klaxon v. *Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941) 7

McDonald v. *Mabee,* 243 U.S. 90, 91 (1917) 13

Nevada v. *Hall,* 440 U.S. 410 (1979) 11

Parker v. *Brown,* 317 U.S. 341, 359-360 (1943) 10

Pennoyer v. *Neff,* 95 U.S. 714, 720 (1877) 12

Solliday v. *The District Court in and for the City and County of Denver,* 135 Colo. 489, 497-98, 313 P.2d 1000, 1004 (1957) 12

PAGE

Steele v. *Bulova Watch Co.*, 344 U.S. 280, 285 (1952) .. 12

Suffolk v. *Chapman*, 31 Ill. 2d 551, 555, 202 N.E.2d 535, 537 (1964) 12

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 n. 13 (1981) 9

United Mine Workers v. *Gibbs*, 383 U.S. 715, 726 (1966) 13

Woods v. *Interstate Realty Co.*, 337 U.S. 535, 537-538 (1949) 11

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 291-294 (1979) 10

CONSTITUTION, STATUTES

U.S. Const. amend. X 10

Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1251, *et seq.*

Section 505(e), 33 U.S.C. §1365(e) 13-15

Section 510, 33 U.S.C. §1370 .....7, 13-15

Indiana Statutes

Ind. Code §36-9-25-1, *et seq.* 10

LEGISLATIVE HISTORY

Congressional Research Service, *A Legislative History of the Clean Water Act Amendments of 1972*, 93rd Cong., 1st Sess., vol. 1, 823, vol. 2, 1503 (1973) 15

BOOKS

1 Beale, *Treatise on the Conflict of Laws* 13-14 (1935) 16

3A Moore, *Federal Practice* ¶18.07 [1.—3], 18-59 (2nd ed. 1984) 13

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HAMMOND RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This brief is filed in opposition to the petitions for writs of certiorari filed by the State of Illinois and the Metropolitan Sanitary District of Greater Chicago in No. 84-38 and William J. Scott in No. 84-21. The opinion of the Court of Appeals reversing the decision of the District Court is reported in the advance sheets at 731 F.2d 403 (7th Cir. 1984), and is set forth in the separately bound Appendices filed with the petitions at A-1. The Court's subsequent order of May 29, 1984, which denied the petitions for rehearing and modified the March 27, 1984 opinion, is unreported and is set forth in the Appendices at B-1. The District Court's opinion is reported at 519 F. Supp. 293 (N.D. Ill. 1981), and is set forth in the Appendices at F-1.

THE NATURE OF THE CASES

In September, 1980 Illinois and the Metropolitan Sanitary District of Greater Chicago filed a five count complaint in the Circuit Court of Cook County, Illinois, against Hammond, Indiana, the Hammond Sanitary District and the District's trustees and manager ("Hammond") in which they alleged that discharges by Hammond of inadequately treated sewage and grease to Lake Michigan which floated to the part of Lake Michigan adjoining Illinois were in violation of the Illinois Environmental Protection Act (Counts I and II), the federal common law of nuisance (Count III), Illinois common law and statutory law of nuisance (Count IV) and the Illinois common law of trespass (Count V). The complaint requested that the court order Hammond: (1) to stop making the discharges, (2) to prevent any illegal or unauthorized interconnections with its sewer systems, (3) to deny any new or additional hook-ups to its system, (4) to remove and dispose of

all complained of materials in Lake Michigan and on the beaches of Lake Michigan in a manner approved in advance by the Illinois Attorney General, the Illinois Environmental Protection Agency, and the United States Environmental Protection Agency within the shortest possible time, (5) to construct and install permanent facilities that would prevent further discharges to Lake Michigan of the type complained of, (6) to pay damages to be placed in a trust fund to reimburse any entity which had or would incur costs to clean the waters of Lake Michigan, (7) to pay a civil penalty of $10,000 for each violation of the Illinois Environmental Protection Act and an additional penalty of $1,000 per day for each day that the violations continued, and (8) to provide such other relief as shall be just.

The Illinois case was removed to the District Court for the Northern District of Illinois by Hammond on the ground that the federal common law of nuisance claim created federal question jurisdiction. The District Court thereafter denied the motion of Illinois to remand the case to state court. *Illinois* v. *Sanitary District of Hammond,* 498 F. Supp. 166 (N.D. Ill. 1980).

William J. Scott filed a class action in the District Court on behalf of citizens of Illinois who used Lake Michigan. He alleged that Hammond's discharges constituted "both a public and private nuisance under Illinois law and independently both a public and private nuisance under federal common law." Scott invoked federal jurisdiction on the basis of diversity of citizenship and the existence of a federal question under the federal common law of nuisance claim. Scott requested

money damages of $1,000,000 "for benefit of the plaintiff class" and an injunction requiring Hammond to cease the challenged discharges.

Hammond moved for dismissal of the petitioners' complaints for failure to state claims. The District Court granted the motion on the federal common law of nuisance claims, but denied it on the state law claims. *Scott* v. *City of Hammond*, 519 F. Supp. 293 (N.D. Ill. 1981), App. at F-1. The District Court certified its ruling for interlocutory appeal under 28 U.S.C. §1292 (b). Hammond was granted permission to appeal by the Court of Appeals and its appeal was consolidated with the consideration of the remand in *Milwaukee II*. App. at E-2.

The Court of Appeals reversed the District Court's decision on the applicability of Illinois law and directed that the cases be dismissed. It observed:

> "In the present cases the political subdivisions of one state claim a right to an extent of use of interstate water in the exercise of their public health functions. A different state complains that a use to that extent causes contamination of its waters and is inimical to public health because those waters are used for water supplies and recreation. This is a controversy of federal dimensions, implicating the conflicting rights of states and inappropriate for state law resolution. The latter state does not seek mere enforcement of effluent limitations established under federal law, but imposition of more stringent limitations.
>
> "The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now." (731 F.2d at 410, App. at A-16)

The Court of Appeals also concluded that in addition to the remedies available to petitioners under the FWPCA, the petitioners could bring an action under Indiana law in a federal or state court in Indiana because the FWPCA preserved state jurisdiction over discharges made within them. 731 F.2d at 410 n. 2, 414; App. at A-16 n. 2, A-23.

Petitioners filed a request for rehearing in which they requested the Court of Appeals to modify its decision to allow them to amend their complaints in the District Court to assert their claims under Indiana law. The Court of Appeals denied this request. App. at B-3.

REASONS FOR DENYING THE WRITS

I

INTRODUCTION

Twelve years ago petitioners Illinois and Scott, its then Attorney General, argued persuasively that the law of one State could not control interstate water pollution disputes. *See* Plaintiff's Brief Regarding the Applicable Law filed by Illinois in *Milwaukee I*. This Court in *Milwaukee I* unanimously held that the nature of such disputes required the recognition of a federal common law of nuisance. *Milwaukee I* recognized that interstate water pollution disputes involve the same considerations of federalism and the sovereign rights of States as interstate water allocation disputes. A State has the power to choose what uses it will permit of the waters within it, but it does not have the power to impose its choices on another State. Although the members of this Court disagreed in *Milwaukee II* over the effect of the 1972 FWPCA amendments, there was no disagreement that under our federal system the law of one State could not govern the discharges to an interstate lake or river made in another State. *Compare Milwaukee II*, 451 U.S. at 314 n. 7, App. at G-7 n. 7; 451 U.S. at 315 n. 8, App. at G-9 n. 8; with 451 U.S. at 335, App. at G-28 - G-29 (Blackmun, dissenting).

The Court of Appeals correctly applied these principles in these cases. It recognized that no State or the courts created by it had the power to impose policy decisions over the use of resources in another State. To permit this to be done would infringe upon the equal power of the other State to make its own policy decisions. Any

disputes arising from conflicting resource uses permitted by different States can only be resolved through federal law. *Milwaukee I*, 406 U.S. at 105 & n. 6, App. at S-13 & n. 6; *Hinderlider* v. *LaPlata River & Cherry Cr. D. Co.*, 304 U.S. 92, 110 (1938). Since 1972 that federal law has been the FWPCA.

The Court of Appeals also correctly recognized that nothing in *Milwaukee I* or the FWPCA prevented someone from asking the courts of a State in which discharges were being made to apply its law to those discharges. This state remedy was specifically preserved in FWPCA section 510 (33 U.S.C. §1370).

Petitioners now contend, contrary to the belief of the entire Court in *Milwaukee II*, that state law can operate far more broadly. They argue that when the federal common law of nuisance was replaced by the FWPCA, an extraterritorial state police power that could not coexist with the federal common law of nuisance was revived as an alternative to federal statutory law. They do not explain how this extraterritorial state power that was suppressed by the federal common law of nuisance can flourish under the FWPCA; it is simply presented as a fact. Rather than accept the Court of Appeals' statement that the "very reasons" that were given for this Court's resort to federal common law in *Milwaukee I* required the decision it reached, petitioners characterize the Court of Appeals' decision as the creation of a federal common law choice-of-law rule for interstate tort disputes. They argue that its implementation would have a profound effect on the remedies available for all torts with interstate aspects and that it conflicts with *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

These cases are not, as petitioners portray them, comparable to simple transboundary tort cases. The conclusions of the Court of Appeals were based on the subject matter of the dispute, the use of water resources within a State, and the significant State interest in that subject matter, especially with respect to its own political subdivisions. Thus, the issue decided by the Court of Appeals was not one of choice-of-law, but the fundamental question of whether a State has the power to impose through its law or courts regulations and financial burdens on the taxpayers of a sister State that infringe upon the sister State's sovereignty. The Court of Appeals recognized the real nature of these cases and correctly followed this Court's decisions on the nature of the relationship of the States.

The Court of Appeals did not hold that there are no remedies for interstate pollution of Lake Michigan. There are the remedies provided by the FWPCA, which were invoked by the United States Environmental Protection Agency and the State of Indiana. Also, more stringent relief can be sought under Indiana law in Indiana courts. Petitioners are not seeking a remedy but the assertion of extraterritorial power either through Illinois statutes or "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." The basis on which review is actually being sought is petitioners' adamant refusal to accept the inherent limitation on state power under our federal system which has been repeatedly confirmed by this Court. Review of the Court of Appeals' decision, therefore, is not warranted.

II

UNDER OUR FEDERAL SYSTEM STATES AND THEIR COURTS CANNOT HAVE EXTRATERRITORIAL POWER OVER THE USE OF INTERSTATE WATERS

The use made of the air, a river or a lake in one State cannot be controlled by any other State. *Milwaukee I*, 406 U.S. at 105 n. 6 (1972), App. at S-13 n. 6; *Hinderlider* v. *LaPlata & Cherry Cr. D. Co.*, 304 U.S. 92, 110 (1938); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907. This Court in *Milwaukee I* created a federal common law of nuisance to govern interstate water pollution disputes because state law could not be applied. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 n. 13 (1981). As the Court succinctly observed in *Milwaukee II*: "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." 451 U.S. at 314 n. 7, App. at G-7 n. 7. There was no dispute on this point in *Milwaukee II*. 451 U.S. at 335, App. at G-28 - G-29 (Blackmun, dissenting). Extraterritorial state power over the use of the environment cannot exist because of the coequal sovereign status of the States.

Just as it is accepted that Canada's Parliament and Canadian courts do not have the power to regulate the emmissions of industries in the United States because of their effect on Canada's environment, it must also be accepted that Illinois law and Illinois courts cannot have the power that petitioners claim for them. The relationship between States in environmental matters is comparable to that between countries, except that the Constitution authorizes a federal resolution of interstate disputes.

Each State is sovereign within its territory, except to the extent provided by the Constitution and laws enacted in accordance with it. U.S. Const. amend. X; *Parker* v. *Brown,* 317 U.S. 341, 359-360 (1943); *Kansas* v. *Colorado,* 206 U.S. 46, 95 (1907). The sovereignty of each State necessarily implies a barrier against intrusion by the laws and courts of sister States into matters that involve the attributes of sovereignty. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 291-294 (1979). Each State has the sovereign power to regulate the use of the resources located within it, but no State has the power to interfere with a sister State's equal power. *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237-238 (1907).

What a State permits to be put into the air and waters in its territory involves policy decisions that arise from the exercise of its fundamental powers as a State and frequently, as in this case, a State's ability to manage traditional governmental operations. The best proof of this is the nature of relief sought in this litigation by Illinois; relief that Illinois and its courts might appropriately impose on an Illinois municipality but cannot impose on an Indiana municipality. For instance, Illinois sought an order that would have blocked economic development in a part of Indiana by barring any new factory, business or home from having access to the only sanitary and stormwater sewer systems in an area of Hammond. Illinois also requested relief that would have involved an Illinois court in directing and controlling the construction of an Indiana municipal sewer facility, who would do it, on what schedule and how it would be paid for by Indiana taxpayers. Such matters are usually the subject of a State's own laws. *See, e.g.,* Ind. Code §36-9-25-1, *et seq.*

Petitioners have cited decisions of this Court such as *Allstate Insurance Co.* v. *Hague,* 449 U.S. 302 (1981), *Nevada* v. *Hall,* 440 U.S. 410 (1979), and *Bradford Electric Co.* v. *Clapper,* 286 U.S. 145 (1932), for their argument that the interstate aspects of petitioners' claims raise no barrier to the application of Illinois law. None of those decisions involved an effort by one State to intrude on the sovereignty of sister States by governing what could be done within their borders. Thus, in *Nevada* v. *Hall* it was noted that a decision involving a traffic accident that occurred outside of Nevada "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n. 24. *See also Allstate Insurance Co.* v. *Hague,* 449 U.S. 302, 324 (1981) (Stevens, concurring).

Petitioners argue that even if Indiana law is the only state law that can govern discharges to Lake Michigan made in Indiana, the Court of Appeals should have remanded these cases to the District Court in Illinois so that petitioners could seek their relief under Indiana law. The Court of Appeals' remand for dismissal was correct, however, because the District Court could not have had jurisdiction under the proposed amended claims.

The dismissal of the federal common law of nuisance claim in the Scott case left diversity as the only basis for federal jurisdiction. Since the District Court under diversity jurisdiction is, in effect, another court of the State of Illinois, it could have retained the case with the proposed amendment only if Illinois courts have the power to grant the relief sought by Scott under the guise of applying Indiana law. *Woods* v. *Interstate Realty Co.,* 337 U.S. 535, 537-538 (1949); *Angel* v. *Bullington,* 330 U.S. 183, 186-187, 192 (1947). It is inconceivable that Illinois

courts by merely saying that they are applying Indiana law could require parties in Indiana to adhere to stricter standards than those established by Indiana pursuant to the FWPCA and to pay for costly facilities not required by Indiana under the FWPCA. The creation of such obligations by Illinois courts through what this Court described in *Milwaukee II* as "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence" would be an intolerable invasion of Indiana's sovereignty.

The jurisdiction of state courts is restricted by the territorial limitations on the power of the respective States. *Hanson* v. *Denckla,* 357 U.S. 235, 251 (1958); *Pennoyer* v. *Neff,* 95 U.S. 714, 720 (1877); *Suffolk* v. *Chapman,* 31 Ill. 2d 551, 555, 202 N.E.2d 535, 537 (1964); *Solliday* v. *The District Court in and for the City and County of Denver,* 135 Colo. 489, 497-98, 313 P.2d 1000, 1004 (1957). Since an Illinois court purporting to apply Indiana law to Hammond would still be only a creation of Illinois, there is no basis on which it can exceed the power possessed by Illinois and infringe upon the sovereignty of Indiana. The Court recognized this principle in the foreign relations context in *Steele* v. *Bulova Watch Co.,* 344 U.S. 280, 285 (1952), in which it was held that a federal court could govern the conduct of United States citizens in foreign countries "when the rights of other nations or their nationals are not infringed" because of the duty owed by citizens to their own government.

To transform an Illinois court claiming to adopt Indiana law into an Indiana court would create a fiction in a field in which Mr. Justice Holmes cautioned: "And in States bound together by a Constitution and subject to

the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee,* 243 U.S. 90, 91 (1917).

The District Court should not have exercised jurisdiction over any claims asserted under Indiana law by Illinois upon remand. The Illinois case was initiated in an Illinois court and removed solely on the ground that it asserted a claim under the federal common law of nuisance. *Illinois* v. *Sanitary District of Hammond,* 498 F. Supp. 166 (N.D. Ill. 1980).[1] The Illinois state law claims fell under the pendent jurisdiction of the District Court. Discovery in the Illinois and Scott cases has been insignificant. If the Illinois case were remanded and Illinois filed a claim under Indiana law, the District Court would be presented with claims based solely upon state law in a case that was procedurally in its infancy. Federal jurisdiction should not be exercised under such circumstances. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966); 3A Moore, *Federal Practice* ¶18.07 [1.-3], 18-59 (2nd ed. 1984).

III

THE FWPCA DOES NOT AUTHORIZE THE USE OF STATE LAW TO GOVERN OUT-OF-STATE DISCHARGES

The Court of Appeals followed the language and legislative history of sections 505(e) and 510 of the FWPCA (33 U.S.C. §§1365(e), 1370) in rejecting petitioners' argument that the sections authorized the extraterritorial application of state law. It found that both sections were saving provisions that preserved the traditional power

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[1] Diversity jurisdiction did not exist over the Illinois case. *Milwaukee I,* 406 U.S. at 97 n. 1, App. at S-6 n. 1.

of the States over the use of water resources within them but did not create any new state power.

Section 505(e)[2] states only that nothing in the provisions of §505 affects any other remedies which persons *may* have under other laws. It is a standard saving provision and means only that the provisions for citizen suits in §505 do not preclude the use of other existing remedies. It does not create remedies itself. *Milwaukee II*, 451 U.S. at 328-329, App. at G-22. Section 510[3] is similar in

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[2] Section 505 provides for citizen suits under certain conditions. Section 505(e) provides:

> "*Nothing in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." (Emphasis added.)

[3] Section 510 provides:

> "Except as expressly provided in this chapter, *nothing in this chapter* shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." (Emphasis added.)

that it provides that *nothing* in chapter 26 of the FWPCA is to preclude or deny the right of any State to adopt requirements more stringent than those created under the FWPCA. It does not purport to create any new State powers, especially extraterritorial powers. The only purpose of §510 was to preserve whatever rights, if any, the States had prior to the 1972 FWPCA amendments. Nothing in the legislative history of §510 indicates any intent other than to prevent the FWPCA being interpreted as a preemption of the existing rights of the States, except as expressly provided. Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of* 1972, 93rd Cong., 1st Sess., vol. 1, 823, vol. 2, 1503 (1973).

IV

ERIE IS NOT APPLICABLE

The Court of Appeals' decision does not contravene *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1958). Since the nature of our federal system requires that the only substantive state law that can be applied to discharges in Indiana is Indiana law, *Erie* is not applicable. If *Erie* were applicable, then *Hinderlider* v. *LaPlata River & Cherry Cr. D. Co.*, 304 U.S. 92 (1938), decided the same day as *Erie*, was wrongly decided. *Erie* did not upset the overriding federal interest in precluding the extraterritorial imposition of the law of one State upon the sovereign rights and interests of another. *Milwaukee* II, 451 U.S. at 334-335; App. at G-28 - G-29 (Blackmun, dissenting). The application of limitations on state power required by our federal system does not constitute the creation of a federal choice-of-law rule any more than the application of constitutional provisions to state actions or laws is a choice-of-law decision.

The fact that Indiana follows the *lex loci delicto* rule in ordinary tort cases that do not involve its sovereign rights cannot be translated into a determination that it would surrender its sovereignty to Illinois. The choice of law involved in ordinary tort cases is a determination of which law of two or more *possible* laws governs a certain situation. 1 Beale, *Treatise on the Conflict of Laws* 13-14 (1935). In interstate water pollution disputes the law of another State is not an alternative possible law.

V

CONCLUSION

For the foregoing reasons the petitions for writs of certiorari should be denied.

Respectfully submitted,

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